82-80

Office - Supreme Court, U.S.
FILED
JUL 14 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF KENTUCKY

ROBERT LESLIE ROSENBAUM, ESQ.
ROSENBAUM & ROSENBAUM
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321

PRINT MASTER, INC., 630 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 276-0341

IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING, *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles King, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above entitled case on December 23, 1981.

QUESTIONS PRESENTED

I. WHETHER THE ACTIONS OF THE KENTUCKY TRIAL AND APPELLATE COURTS IN ALLOWING THE PROSECUTION'S USE OF TAPED CONVERSATIONS OF CO-DEFENDANTS AND OF ONE OTHER PERSON WITHOUT PRODUCING THE DECLARANTS FOR CROSS-EXAMINATION ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENT AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT?

II. WHETHER THE APPLICATION OF KY. REV. STAT. §510.145, "THE RAPE SHIELD LAW," WHICH PROHIBITED PETITIONER FROM CROSS-EXAMINATION TO SHOW BIAS, MOTIVE AND IMPEACH CREDIBILITY RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT IT DENIED PETITIONER HIS RIGHT TO CONFRONTATION?

III. WHETHER THE FAILURE TO GIVE PETITIONER'S REQUESTED CORROBORATION INSTRUCTION PURSUANT TO RCr 9.62 VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I OF THE UNITED STATES CONSTITUTION WHICH RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT?

IV. WHETHER THE TRIAL AND APPELLATE PROCEEDINGS WERE TAINTED BY A SERIES OF PREJUDICIAL ERRORS THAT WHEN TAKEN INDIVIDUALLY OR AS A WHOLE, RENDERED THE CONVICTION SO FUNDAMENTALLY UNFAIR AND IN DIRECT CONFLICT WITH A DECISION OF THIS COURT THAT IT DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2-15

REASONS FOR GRANTING THE WRIT 16-28

I. THE ACTIONS OF THE KENTUCKY TRIAL AND APPELLATE COURT IN ALLOWING THE PROSECUTION'S USE OF TAPED CONVERSATIONS OF CO-DEFENDANTS AND OF ONE OTHER PERSON WITHOUT PRODUCING THE DECLARANTS FOR CROSS-EXAMINATION ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENT AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT. 16-21

II. THE APPLICATION OF KY. REV. STAT. §510.145, "THE RAPE SHIELD LAW," WHICH PROHIBITED PETITIONER FROM CROSS-EXAMINATION TO SHOW BIAS, MOTIVE AND IMPEACH CREDIBILITY RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT IT DENIED PETITIONER HIS RIGHT TO CONFRONTATION. 22-24

III. THE FAILURE TO GIVE PETITIONER'S REQUESTED CORROBORATION INSTRUCTION PURSUANT TO RCr 9.62 VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS

TABLE OF CONTENTS (Continued)

Page

IN ARTICLE I OF THE UNITED STATES CONSTITUTION WHICH RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT. 24-26

IV. THE TRIAL AND APPELLATE PROCEEDINGS WERE TAINTED BY A SERIES OF PREJUDICIAL ERRORS THAT WHEN TAKEN INDIVIDUALLY OR AS A WHOLE, RENDERED THE CONVICTION SO FUNDAMENTALLY UNFAIR AND IN DIRECT CONFLICT WITH A DECISION OF THIS COURT THAT IT DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 26-28

CONCLUSION 29

APPENDIX A
OPINIONS BELOW 1a-15a

APPENDIX B
STATUTORY PROVISIONS INVOLVED 1b-6b

APPENDIX C
MISCELLANEOUS DOCUMENTS 1c-21c

TABLE OF AUTHORITIES CITED

CASES: Page

FEDERAL:

Barber v. *Page*,
390 U.S. 719 (1968) 16

Brookhart v. *Janis*,
384 U.S. 1 (1966) 19, 24

Bruton v. *United States*,
391 U.S. 123 (1968) 17

California v. *Green*,
399 U.S. 149 (1970) 17, 18

Chambers v. *Mississippi*,
410 U.S. 284 (1973) 26

Chapman v. *State of California*,
386 U.S. 18 (1967) 20

Davis v. *Alaska*,
415 U.S. 308 (1974) 9, 14, 19, 23, 24

Dobbert v. *Florida*,
432 U.S. 282 (1977) 25

Douglas v. *Alabama*,
380 U.S. 415 (1965) 17, 23

Dutton v. *Evans*,
400 U.S. 74 (1970) 18, 21

Government of Virgin Islands v. *Civil*,
591 F.2d 255 (3rd Cir. 1979) 25

Hoover v. *Beto*,
439 F.2d 913 (5th Cir.), *rev'd on other grounds en banc*, 467 F.2d 516, *cert. denied*,
409 U.S. 1086 (1971) 19

TABLE OF AUTHORITIES CITED (Continued)

Page

Ohio v. *Roberts*,
448 U.S. 56 (1980) 17, 21

Park v. *Huff*, 493 F.2d 923 (5th Cir. 1974),
rev'd on other grounds en banc, 506 F.2d 849,
cert. denied, 423 U.S. 824 (1975) 19

Pointer v. *Texas*,
380 U.S. 400 (1965) 17

Simmons v. *United States*,
440 F.2d 890 (7th Cir. 1971) 19

Smith v. *Illinois*,
390 U.S. 129 (1968) 19, 24

STATE:

Commonwealth v. *Brown*,
619 S.W.2d 699 (Ky. 1981) 25, 26

King v. *Commonwealth*,
No. 81-CA-742-MR (Ky. Ct. App. Dec. 23,
1981) 13, 14, 15, 20, 22, 24, 25, 29

Smith v. *Commonwealth*,
566 S.W.2d 181 (Ky. App. 1978) 15

Williams v. *Watson*,
268 S.W. 1067 (Ky. 1925) 27

CONSTITUTION:

U.S. Const. art. I, §10, cl. 1 ..... 24, 25, 26

U.S. Const. amend. VI 13, 16, 17, 20, 23

U.S. Const. amend. XIV, §1 26

TABLE OF AUTHORITIES CITED (Continued)

Page

STATUTES:

STATE:

Ky. Rev. Stat. Ann. §502.020 (Bobbs-Merrill 1975) . . 3, 8

Ky. Rev. Stat. Ann. §510.040 (Bobbs-Merrill 1975) . . . 3

Ky. Rev. Stat. Ann. §510.145 (Bobbs-Merrill Supp. 1980) (Effective June 19, 1976) 22, 24

Ky. Rev. Stat. Ann. §529.040 (Bobbs-Merrill 1975) . . 24

Ky. Rev. Stat. Ann. §529.060 (Bobbs-Merrill 1975) . . 25

Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished effective Sept. 1, 1980) 12, 24, 25

SECONDARY SOURCES:

Tanford & Bocchino, *Rape Victim Shield Laws and The Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980) 23

OPINIONS BELOW

The judgment of the Fayette Circuit Court, Second Division of November 18, 1980, the December 23, 1981, Opinion of the Court of Appeals of Kentucky (of which review is sought), the Order Denying Petition For Rehearing of February 26, 1982, the May 18, 1982, Order Denying Discretionary Review in the Supreme Court of Kentucky and the May 21, 1982 Order Granting Stay of Execution are reprinted in Appendix A hereto. All of the above-mentioned opinions are unreported.

JURISDICTION

The opinion of the Court of Appeals of Kentucky (Appendix A, page 5a) was entered on December 23, 1981, affirming petitioner's conviction. A timely petition for rehearing was denied on February 26, 1982. The Order Denying Discretionary Review was entered in the Supreme Court of Kentucky on May 18, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

The following are the constitutional, statutory and rule provisions involved in this petition and are reprinted in pertinent part in Appendix B hereto:

U.S. Const. art. I, §10, cl. 1

U.S. Const. amend. VI

U.S. Const. amend. XIV, §1

Liability for conduct of another—Complicity, Ky. Rev. Stat. Ann. §502.020 (Bobbs-Merrill 1975).

Definitions—Forcible Compulsion, Ky. Rev. Stat. Ann. §510.010(2) (Bobbs-Merrill 1975).

Rape in the first degree, Ky. Rev. Stat. Ann. §510.040 (Bobbs-Merrill 1975).

Inadmissibility of evidence of prior sexual conduct or habits of complaining witness—Exception—Procedure for admission, Ky. Rev. Stat. Ann. §510.145 (Bobbs-Merrill Supp. 1980) (Effective June 19, 1976).

Promoting prostitution in the second degree, Ky. Rev. Stat. Ann. §529.040 (Bobbs-Merrill 1975).

Corroboration, Ky. Rev. Stat. Ann. §529.060 (Bobbs-Merrill 1975).

Testimony of accomplice, Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished effective Sept. 1, 1980).

STATEMENT OF THE CASE

Charles King was found guilty in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, of rape in the first degree of Sue Blevins and of promoting the prostitution activities of Sue Blevins. He was sentenced to fifteen years imprisonment. (R 67-70, V IV p 491-492).[1]

---

[1] All proceedings which are not stenographically reported will be referred to as the Record and noted by the letter R. Proceedings stenographically reported and transcribed consist of five volumes. The first volume is a transcript of a hearing on pre-trial motions and will be referred to by the letters PT, followed by the page number at which point the evidence appears. The proceedings at trial are transcribed in four volumes with pages consecutively numbered from 1 to 500. The stenographically reported transcription of the trial proceedings will be referred to by the letter, V, for the volume, followed by roman numeral I through IV, for the particular volume referred to, followed by the letter, p, for the page on which the evidence is found.

Ky. Rev. Stat. §510.040(1)(a) states, "A person is guilty of rape in the first degree when: he engages in sexual intercourse with another person by forcible compulsion; . . ." Ky. Rev. Stat. Ann. §510.040 (Bobbs-Merrill 1975) [Hereinafter cited as Ky. Rev. Stat. unless a different edition date]. It is admitted that petitioner did not have sexual intercourse with Sue Blevins (V II p 228). The petitioner was found guilty of the rape under another statutory provision, Ky. Rev. Stat. §502.020(1), which is termed a "complicity" statute. The complicity statute states a person is guilty of an offense committed by another when with the intent of promoting or facilitating the commission of the offense, he either engages in a conspiracy with the other person to commit the offense or he aids, counsels, or attempts to aid the other person in committing the offense.

The rape charge grew out of events occurring on or about February 24, 1980, and the prostitution charge arose out of events also occurring in February, 1980 (R 2-3).

The indictment against petitioner was in three counts. The first count charged that petitioner, Anthony Rucker and Gary Blevins, husband of Sue Blevins, committed the offense of rape by making Sue Blevins engage in sexual intercourse with Anthony Rucker by forcible compulsion. The second count of the indictment charged that petitioner, Gary Blevins, and Buck Johnson committed the offense of rape by making Sue Blevins engage in sexual intercourse with Buck Johnson by forcible compulsion. The third count of the indictment dealt with the prostitution offense. (R 2-3). Before a brief review of the evidence, it is useful to state the names and relationships of the actors in this case.

Sue Blevins was seventeen years old at the time of trial and was married to the co-defendant, Gary Blevins (V II p 196-197). The petitioner was forty years old at the time of trial and was married to Eleanor King. The events in question took place at a building owned by the Kings, housing a laundromat and apartments (V III p 304-305, 403). Gary Blevins worked in the petitioner's vending machine business (V III p 362), and Sue worked in the laundromat (V III p 305, V II p 200). Anthony Rucker and Buck Johnson were present when the alleged rape occurred (V III p 347, 384-385, 391).

The prostitution charge arose out of an incident involving a man named Gene Ross (V I p 97-98). Sue testified petitioner had requested a girl named Kim Christianson to be a pimp for Sue's prostitution activities (V II p 201-202). Gene Ross was at the laundromat to do some plumbing work (V III p 362-364). Sue testified she willingly engaged in sexual intercourse with Gene Ross at Kim's request (V II p 202-203, 235). Kim testified Gene Ross paid $30.00 for the sex and Kim received $10.00 and petitioner received $20.00 (V I p 81). Although Kim's testimony incriminated the petitioner, Kim had given a sworn statement before trial that the sexual activity and payment were solely the result of an arrangement between Gene Ross and Sue, and petitioner had no knowledge of the transaction before it occurred (V I p 80-89).

Gene Ross testified he had been propositioned by Kim while doing work at the laundromat (V I p 99-101). Ross stated King did not have him come to the laundromat in order to engage in prostitution activities (V I p 105). King was not present when the sex occurred (V I p 105).

King discussed the prostitution with Gary and Sue and informed them that this kind of activity was unacceptable and Sue would have to leave if she wanted to be a prostitute (V III p 368-371).

On or about February 24, 1980, a Saturday, Sue told the petitioner's young daughter about the prostitution, and King's wife was informed of this event that day (V II p 205-206). Eleanor King came to the laundromat, became angry, and slapped Sue, Gary, and the petitioner (V II p 206). Thereafter, Sue informed the petitioner's wife that Sue had been to bed with the petitioner (V II p 242-245).

Sue testified she was angry with petitioner's wife because she slapped Sue, and Sue stated she would like to get even with them and that she always tries to pay people back who hurt her (V II p 246-247).

After petitioner's wife left, petitioner tape-recorded a conversation between Sue and him. The first part of the tape was made by the petitioner, but more conversations were on the tape, and it is disputed as to who made the second part of the tape recording. Petitioner stated the first part of the tape recording was made at 5:00 or 6:00 o'clock p.m. Sue admitted on the tape that she had lied to petitioner's wife. Petitioner was angry with Sue and told her he had something planned for her, but did not tell her what it was. The plan was to evict Sue and her husband from the apartment (V III p 378-380). Later, petitioner told Gary he and his wife had to leave, but Gary didn't want to leave, and so petitioner stated Gary could stay, but Sue had to leave. Gary said he could not find a place for her that evening but he could find some place for her by noon the next day. At around 7:00 o'clock or 8:00 o'clock p.m., Sue became angry with them and told them she would get

even and they would pay for this (V III p 380-382). Sue also testified she was mad at Charlie for using bad language and talking to her on the tape and calling her names (V II p 256).

Thereafter, petitioner went to his shop to work, and Anthony Rucker came by to get some money that was owed. Petitioner told Rucker to return later for his money. Rucker had beer with him and left it with petitioner who drank the beer (V III p 384-385).

Later, petitioner's wife returned and petitioner asked her to listen to the tape which petitioner asserted would prove Sue had been lying about going to bed with him. Petitioner's wife refused to listen (V III p 317-319).

After Eleanor left, the petitioner, Gary, and Sue were sitting in the apartment, and Gary offered Charlie a drink of whiskey, and they started drinking. Rucker returned, and Sue made a pass at him and she and Rucker went into the bedroom. Petitioner denied forcing Sue to go and says that Sue went willingly (V III p 388-389).

Buck Johnson came by the apartment at approximately 1:30 a.m. Buck Johnson was drunk. Sue went and sat on the arm of his chair. All of the people present encouraged Sue's advances and egged Buck on although no threats of death or physical injury were made. Petitioner admitted to being drunk at this time. Petitioner testified Sue and Buck were both drinking and they went into the bedroom later (V III p 390-395).

When Johnson entered the apartment, the second part of the tape recording started. Petitioner denied recording the voices which commenced when Johnson came into the apartment. Sue knew how to operate the tape recorder (V

III p 390-393). Although Sue denied turning the tape recorder on, the evidence reveals she was the only one close enough to the tape recorder to have turned it on when Johnson came into the room (V II p 266-269).

The voices of petitioner, his son, Gary Blevins, and Buck Johnson appear on the tape (V II p 208, 218, 220). The tape was never transcribed, but parts of the tape appear at V II p 208-224.

Two women came by the apartment at approximately 3:30 a.m. and stated that petitioner was outside of the apartment with Gary Blevins. They looked through the window into the apartment and saw a girl laughing and running around with no clothes on. They saw nothing which indicated Sue was being forced to stay in the apartment, and if Sue had called for help, then they would have called the police (V III p 347-350, 352-354).

Another woman came by the apartment at approximately 4:30 a.m. and noted that Sue was on the couch covered with a bedspread which she took off and walked around the apartment naked. This person saw nothing to indicate Sue was being kept against her will. Sue admitted at that time that she was drunk (V III p 355-358).

The next morning, Sue's sister by adoption came to the apartment where Sue and Gary lived (V I p 107-108). Then a sister-in-law by adoption also came to the apartment that morning and talked to Sue's husband, Gary, who gave the sister-in-law the tape recording (V I p 123-126, 131). Sue's brother by adoption listened to the tape recording at his home and later took Sue to the bus station and put her on the bus for Ohio, where Sue's mother lived (V I p 127, 139). Sue never mentioned to her sister-in-law that she had been

raped the previous evening (V I p 129). Sue never mentioned to her brother by adoption that she had been raped (V I p 136).

At trial, Sue testified she engaged in these sexual activities because she was afraid of petitioner (V II p 279). However, she positively stated petitioner never threatened to kill her (V II p 277). Sue was asked if petitioner ever threatened her with immediate physical injury, and Sue replied the only thing she remembers was that he hit her and "liked" to broke her thumb earlier in the afternoon when Eleanor had been present (V II p 279).

Before trial, the petitioner, being unsure as to how he could be guilty of raping a woman with whom he did not have sex, filed motions to require the respondent to state the theory upon which the prosecution was proceeding under the complicity statute, Ky. Rev. Stat. §502.020(1)(a), (b); i.e., either by aiding and assisting or by conspiracy (R 8-11). The Commonwealth replied petitioner's guilt was "by being an aider and abettor to Buck Johnson and Anthony Rucker in the rape of Sue Blevins" (R 17). At a pretrial hearing, petitioner's attorney inquired as to whether the Commonwealth was proceeding under a conspiracy theory (PT p 14), and the Commonwealth represented that no conspiracy was involved (PT p 15). This representation was embodied in an order stating, "[I]t is agreed that Charlie King's accountability, if any, is solely founded on the theory of aiding as defined in KRS 502.020(1)(b)" (R 14).

At trial in an *in camera* hearing, petitioner informed the court he intended to offer proof concerning prior sexual conduct of Sue Blevins. The trial court was informed that Sue Blevins, an adopted girl, had engaged in sexual con-

duct with her father which amounted to touching and fondling but not genital sex, and this occurred at the age of thirteen. Also, the court was informed Sue Blevins had engaged in genital sex with the husband of Sue's sister, causing the break-up of the sister's marriage. Aside from the incident of prostitution charged in the indictment, the court was told of evidence that Sue's mother along with her aunt would dress her up and take her to bars in order to act as bait to attract men so the mother and aunt could engage in prostitution activities (V I p 4-7). An avowal was made as to this proferred evidence (V I p 19, V II p 290-295).

The trial court was informed that although this evidence was not admissible *per se* under the Kentucky Rape Shield Statute, the petitioner should be allowed to introduce the subject because of his right of confrontation, and the court was specifically referred to the case of *Davis* v. *Alaska*, 415 U.S. 308 (1974) (V I p 8).

Also, in an *in camera* hearing, petitioner objected to the introduction into evidence of the tape recording of conversations prior to the alleged rape. It was pointed out to the trial court that aside from the fact the verbal statements on the tape were obscene and inflammatory to the prejudice of petitioner, voices of other persons, the most prejudicial of which was Gary Blevins' voice, appeared on the tape and petitioner could not cross-examine a tape recording. Hence, the playing of the tape recording violated the petitioner's constitutional right to cross-examine witnesses against him (V I p 43-49).

During the *voir dire* and on other occasions, the prosecutor referred to Sue as being mentally retarded and this was objected to because there was not and would not be any evidence of retardation and because there would not

be any attempt to base Sue's lack of consent on lack of mental capacity. The objections were overruled (V I p 25-26, V IV p 468, 470).

Thereafter, evidence was received. One witness was a policeman who stated he met with Sue's relatives on Monday, February 25, 1980, and was given the tape of the alleged rape (V II p 141-142). On the same day the same policeman took a taped statement from the petitioner at the police station (V II p 143). The policeman was allowed to play for the jury the tape of petitioner's statement to the police (V II p 143-145).

The petitioner's statement given to the police and played at the request of the Commonwealth notes that Sue had had psychological problems (V II p 149), that Sue had admitted that her aunt and mother had been prostitutes (V II p 150), and that Sue was promiscuous (V II p 152). The petitioner admitted Sue probably had engaged in sexual intercourse with Buck Johnson and Anthony Rucker on the evening in question and she may have had sex with others on the same night (V II p 162-167).

Thereafter, the trial court over objection allowed the tape recording to be played of petitioner's afternoon conversation with Sue, and of statements made by petitioner, Gary Blevins, Buck Johnson, and others prior to the alleged rape (V II p 178-181). The Commonwealth did not attempt to produce in court the persons whose voices appeared on the tape. There was some indication that Buck Johnson and Anthony Rucker, if summoned to testify, would avail themselves of their fifth amendment privileges not to incriminate themselves (V II p 182). However, Gary Blevins was not called and had been tried for this offense previous to petitioner's trial. At his trial, Gary Blevins

took the stand and testified at length in his own behalf (Supplemental Record on appeal).

After the tape of the alleged rape was played by the policeman, the Commonwealth played the tape a second time for Sue Blevins on the pretext of allowing Sue to identify the voices of those present. This was objected to on the grounds previously stated and because it was repetitive. The court overruled the objection and allowed a continuing objection to the playing of the tape for the grounds stated (V II p 207-208).

After the direct testimony of Sue Blevins, petitioner requested the court to be allowed to cross-examine Sue concerning her prior prostitution activities for the reasons previously stated and because the Commonwealth had itself introduced the matter into evidence by the playing of the taped statement of petitioner wherein petitioner noted Sue's prior sexual problems. The trial court instructed petitioner's attorney not to mention the matter (V II p 231).

The tape recording of the alleged rape was played a third time during petitioner's testimony so petitioner could listen to the tape in front of the jury, and this was objected to (V III p 427-428).

The Commonwealth played the tape of the alleged rape a fourth time during its closing argument over the continuing objection of petitioner (V IV p 478).

In its written instructions to the jury, the trial court violated its own order that Charles King's accountability would be founded solely on the theory of aiding. The trial court instructed the jury that petitioner would be guilty of first degree rape if Gary Blevins used forcible compulsion to make Sue Blevins engage in intercourse with Buck

Johnson and if petitioner aided, counseled or attempted to aid Gary Blevins in making Sue Blevins engage in said sexual intercourse (R 45).

At the time the alleged offense took place, a Kentucky Rule of Criminal Procedure, RCr 9.62, was in effect and provided that the testimony of an accomplice would not be sufficient to convict unless the testimony was corroborated. Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished Sept. 1, 1980). At the time of trial, the rule requiring corroboration of accomplice testimony had been abolished. The trial court refused to give petitioner's requested instruction requiring corroboration of the testimony of the admitted accomplice, Kim Christianson (V III p 440).

The jury received the case at 9:05 p.m. on September 30, 1980, and deliberated until 1:00 a.m. the following morning at which time the jury went into recess (V IV p 480-484). At 10:00 o'clock a.m. October 1, 1980, the jury again retired and resumed deliberations. At that point in time, petitioner's attorney informed the court that the tape of the alleged rape had been taken to the jury room without knowledge of petitioner's attorney and objection was lodged of record. The record reflects the jury was furnished with a cassette tape recorder which initially was battery powered, and during the deliberations the jury wore out the batteries on the tape recorder listening to the tape and had to be furnished with an extension cord to allow the tape recorder to operate directly off of electric current. Petitioner requested the swearing of the jury be set aside and a mistrial declared. The motions were overruled (V IV p 485-486).

The jury deliberated until 3:09 p.m. on the afternoon of October 1, 1980, at which time they returned and found the petitioner guilty of rape in the first degree involving Buck Johnson and of promoting prostitution (V IV p 489-492). It is notable that the jury acquitted petitioner on the rape based on Anthony Rucker's conduct when Anthony Rucker's voice did not appear on the tape.

In the appeal, styled, *King* v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Dec. 23, 1981) [Hereinafter cited as *King* v. *Commonwealth*], petitioner claimed the use of the tape of the alleged rape violated his constitutional rights of confrontation under the United States Constitution because the tape recording of voices of out-of-court declarants were used to prove his guilt, and petitioner could not confront those persons whose voices appeared on the tape. Moreover, petitioner noted Gary Blevins had testified in his own trial previous to that of the petitioner and, hence, was available even though no attempt was made to produce him. Brief for Appellant at 14-15, Reply Brief for Appellant at 2, *King* v. *Commonwealth*. Further, petitioner argued that regardless of the effect of Kentucky's Rape Shield Law, he should have been permitted to introduce evidence of Sue's prior sexual conduct to show her true motive to damage petitioner, to show her bias, and to show the jury she was not an innocent young girl but instead was sexual manipulator, well-versed in prostitution. Moreover, petitioner argued before the Court of Appeals of Kentucky that the Commonwealth had itself injected the matter into evidence by playing petitioner's recorded statement in which he told the police of Sue's prior prostitution activities. The petitioner informed the Court of Appeals of Kentucky that these rights were guaranteed to him by the Sixth Amendment of the United

States Constitution and by this Court's opinion in *Davis* v. *Alaska*, 415 U.S. 308 (1974). Brief for Appellant at 18-19.

Petitioner argued before the Court of Appeals of Kentucky that to refuse him the benefit of the accomplice instruction required by Kentucky law at the time the alleged crime was committed but which was repealed before the trial was an *ex post facto* violation and, hence, unconstitutional. Reply Brief for Appellant at 3.

Petitioner also argued the repetitive playing of the tape of the alleged rape was erroneous and prejudicial (Brief for Appellant at 16), that it was erroneous to allow the tape to be played repeatedly in the jury room (*Id.* at 16-17), and that it was error for the court to violate its own order and instruct the jury that petitioner was responsible for Gary Blevins' conduct when the order had stated that petitioner was accountable solely as an aider to Buck Johnson (*Id.* at 19-21).

In an unpublished opinion, the Court of Appeals of Kentucky stated, "It is our opinion that there was sufficient evidence to sustain the rape conviction even in the absence of the tape." *King* v. *Commonwealth* at 3.

No mention is made in the opinion of the Court of Appeals of Kentucky concerning petitioner's argument that the admission of the tape recording into evidence violated petitioner's right to confront witnesses, a federal constitutional right.

As concerns the federal confrontation question raised by the application of the "Rape Shield Law," the Court of Appeals of Kentucky stated,

> It is our opinion that it does not violate the United States Constitution or the Constitution of Kentucky. *Smith* v. *Commonwealth*, Ky. App., 566 S.W.2d 181 (1978). Even assuming that there was error in excluding the evidence which appellant sought to introduce as to Sue's prior sexual conduct, we are of the opinion that it could not have been prejudicial to the appellant's case, in view of the fact that there was already evidence throughout the record that Sue was engaging in prostitution. *King* v. *Commonwealth* at 5.

The Court of Appeals of Kentucky did not find that the trial court violated its own order concerning the theory on which petitioner was to be held accountable, rather, it stated there was no error because the Commonwealth had said in a response to a discovery motion that the Commonwealth intended to prove that Gary Blevins threatened the use of force. *King* v. *Commonwealth* at 6.

The Court of Appeals of Kentucky did not address the *ex post facto* argument concerning the corroboration of accomplice testimony instruction and did not discuss the repetitive playing of the tape recording during trial or the taking of the tape recording to the jury room.

Petitioner sought a discretionary review of his case before the Supreme Court of Kentucky and was denied same. Appendix A at 14a.

An order of the Court of Appeals of Kentucky has been entered staying the execution of sentence in order to allow petitioner to seek a writ of certiorari from this Court. Appendix A at 15a.

REASONS FOR GRANTING THE WRIT

I. THE ACTIONS OF THE KENTUCKY TRIAL AND APPELLATE COURTS IN ALLOWING THE PROSECUTION'S USE OF TAPED CONVERSATIONS OF CO-DEFENDANTS AND OF ONE OTHER PERSON WITHOUT PRODUCING THE DECLARANTS FOR CROSS-EXAMINATION ARE IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENT AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

Persons whose voices appeared on the tape of the events prior to the alleged rape were available to testify at trial. Of the voices appearing on the tape, other than petitioner's voice, the voice of Gary Blevins was especially damaging to the petitioner because of its lurid content and because of the instructions given to the jury. *See* Instruction No. 4, Instructions to Jury, Appendix C at 17c. The instructions informed the jury to find the petitioner guilty if he aided Gary Blevins in using forcible compulsion on Sue and in doing so provided Buck Johnson with the means to have sexual intercourse with the victim. *Id.* Gary Blevins was available to testify because his trial had taken place before petitioner's trial, and he had taken the stand and testified in his own defense. The Commonwealth made no attempt to produce Gary Blevins.

Accordingly, the instant case falls squarely within the rationale of *Barber* v. *Page*, 390 U.S. 719 (1968), where this court held that when there is no prosecutorial showing of unavailability of the declarant whose out-of-court statements are sought to be introduced, then the introduction of the out-of-court statements violates the confrontation requirements of the Sixth Amendment.

Also, the voice of petitioner's son appears on the same tape recording, and there was no prosecutorial attempt to show that petitioner's son was unavailable.

This Court has long held the use of out-of-court statements as substantive evidence of guilt without affording cross-examination of out-of-court declarants raises important and substantial federal questions in regard to the confrontation clause of the U. S. Const. amend. VI. *See Pointer* v. *Texas*, 380 U.S. 400 (1965), *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968).

This Court has long recognized the confrontation clause reflects a preference for actual face-to-face confrontation at trial. *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980), *California* v. *Green*, 399 U.S. 149, 157 (1970). The right of cross-examination is one of the primary interests secured by the confrontation clause. *Douglas* v. *Alabama*, *supra*.

Even if it could be argued in good faith, which it cannot, that the testimony of the out-of-court declarants was admissible as an exception to the hearsay rule, the Commonwealth never attempted to meet the exception by showing unavailability of Gary Blevins and petitioner's son. In *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), this Court stated, "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant."

Even if the out-of-court statements were shown to be made by unavailable declarants, the statements would not by definition conform with the constitutional requirements

embodied in the confrontation amendment. "[I]ndeed, we have more than once found violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *California* v. *Green*, 399 U.S. 149, 155-156 (1970).

In this regard it should be noted that while there is no question that the statements on the tape were made, there are large questions concerning the reliability of what the import or intent of the statements was. The statements consist of drunken remarks and obscenities, commenting upon Sue's promiscuous tendencies. Whether or not the remarks were intended to force Sue to engage in non-consensual intercourse can only be determined by cross-examining the declarants and asking them what the remarks meant.

The respondent might seize upon dicta in *Dutton* v. *Evans*, 400 U.S. 74, 88 n. 19, 96 n. 3 (1970), for the proposition that petitioner should have called Gary Blevins and petitioner's son as witnesses.

There are two reasons why this is not so.

First, there was an important tactical reason not to call Gary Blevins as a witness. In reliance upon the Commonwealth's agreement that petitioner's accountability was as an aider or abettor to Buck Johnson, Gary Blevins' testimony would have been immaterial to petitioner's liability. Before the trial court erroneously instructed the jury, petitioner expected to use the argument that regardless of whether or not Gary Blevins forced his wife to engage in intercourse with Buck Johnson, the petitioner did not use such force.

Second, the fact remains that the burden to produce witnesses is on the state when faced with the right to confrontation. The fact that petitioner could call out-of-court declarants is not a substitute. On cross-examination the petitioner would have greater freedom in questioning witnesses; i.e., the right to use leading questions, and the prosecution could have impeached Gary Blevins had he been a witness for petitioner. *See Park* v. *Huff*, 493 F.2d 923, 934 (5th Cir. 1974), *rev'd on other grounds en banc*, 506 F.2d 849, *cert. denied*, 423 U.S. 824 (1975).

> [T]hat when an extrajudicial declaration is used under circumstances such that opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that the defendant could have subpoenaed him, does not, in our opinion, suffice. *Simmons* v. *United States*, 440 F.2d 890, 891 (7th Cir. 1971), *See also Hoover* v. *Beto*, 439 F.2d 913, 939 (5th Cir.) *rev'd on other grounds en banc*, 467 F.2d 516, *cert. denied*, 409 U.S. 1086 (1971).

The Kentucky appellate court in essence ruled the admission and use of the tape recording of conversations prior to the alleged rape constituted harmless error. With due respect, this is not true.

The harmless error finding below was contrary to this Court's prior holdings that the denial of cross-examination is a constitutional error of the first magnitude and no showing of want of prejudice could cure it. *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966), *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

Aside from the tape recording in question, there was little, if any, evidence of petitioner's guilt. Even the supposed victim testified petitioner not only did not have intercourse with her, but petitioner never threatened her with death or with immediate physical injury. The tape itself was highly prejudicial, being so vulgar that it could not help but inflame the sensibilities of any average juror. The Commonwealth thought so much of the potency of this piece of evidence that it played the tape four times during the trial and then managed to give the jury a battery-operated tape recorder in order to listen to the tape. The jury exhausted the batteries of the tape recorder while listening to the tape and requested and received an extension cord to listen further to the tape.

Petitioner was convicted because of the playing of an obscene and pornographic sound track. The appellate court could not in good conscience believe beyond a reasonable doubt that the constitutional error complained of did not contribute to the result. As a matter of fact, the "harmless error" standard used by the appellate court is contrary to this Court's holding in *Chapman* v. *State of California*, 386 U.S. 18, 24 (1967). *King* v. *Commonwealth* at 3.

Additionally, this case presents unique, federal questions upon which this Court should rule.

A thread running through all of this Court's decisions in confrontation cases is the conflict and interplay between the confrontation clause and the hearsay rule. The two are not identical.

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court

has never equated the two, and we decline to do so now. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970).

Admitting the difficulty, this Court has resolved to meet the problem in the following manner: "True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980).

The tape of conversations prior to the alleged rape does not fit into an evidentiary niche. It has characteristics of documentary evidence and of implied assertions bearing on the ultimate issues presented. This type of evidence has never been put to the test of the confrontation clause, and the instant case presents the opportunity to do so. The modern proliferation of sound and video recording devices suggests that this type of "evidence" will appear in trials on an increasingly frequent basis.

In testing the admissibility of the out-of-court statements of unavailable declarants, this Court has been concerned with whether the statement has indicia of reliability, typically as to whether the statement was introduced exactly as uttered by the out-of-court declarant. But in the instant case there is no doubt the words were spoken. Even so, the reliability of what the words meant or intended is highly doubtful without the declarants being available for cross-examination. The writ requested should be granted so as to formulate reliability standards for implied assertions of guilt in situations where the text of the statement is known but the meaning is not.

II. THE APPLICATION OF KY. REV. STAT. § 510.145, "THE RAPE SHIELD LAW," WHICH PROHIBITED PETITIONER FROM CROSS-EXAMINATION TO SHOW BIAS, MOTIVE AND IMPEACH CREDIBILITY RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT IT DENIED PETITIONER HIS RIGHT TO CONFRONTATION.

Petitioner was prevented from inquiring into the past sexual conduct of the victim because the Kentucky "Rape Shield Law" prevented admission of such evidence at trial. The Court of Appeals of Kentucky when confronted with petitioner's objection to the application of the "Rape Shield Law", stated merely that the statute [Ky. Rev. Stat. Ann. §510.145 (Bobbs-Merrill Supp. 1980) (Effective June 19, 1980)], "does not violate the United States Constitution or the Constitution of Kentucky." *King* v. *Commonwealth* at 5.

Petitioner proposed to use evidence of past sexual conduct as support for his theory of the case. "The inference in this case exists that Sue Blevins was a sexual manipulator, well-versed in prostitution, who in the past had used sex in a manner destructive to familial relationships." Brief for Appellant at 18. This evidence along with the victim's admission that she wanted to hurt the petitioner and his wife demonstrate bias and a motive to fabricate the charge of non-consensual sexual intercourse. Indeed, this prior sexual history demonstrates a habit on the part of the victim to use sex in a manipulative or vengeful manner toward people closest to her personal life. It was evidence of a distinctive pattern of conduct, closely resembling the petitioner's version of the encounter, to prove more than just consent. This evidence, when coupled with Sue Blevins'

statements to Eleanor King as to Charles King's sexual activities with her cast shadows on the alleged victim's credibility that the jury should be allowed to hear.

In an analogous case, *Davis* v. *Alaska*, 415 U.S. 308 (1974), this Court held that the state's interest in a Juvenile Shield Law must yield to the accused's Sixth Amendment Right to Confrontation through cross-examination. Petitioner relies heavily on *Davis* for support of this petition.

The right to cross-examine is a primary interest secured by the Confrontation Clause of the U.S. Const. amend. VI. *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). "Cross-examination is the principal means by which believability of a witness and the truth of his testimony are tested." *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). To petitioner's knowledge this Court has not decided the question of how far a state can go in restricting a defendant's right to confrontation by application of a Rape Shield Statute. As at least forty-six (46) jurisdictions have enacted such legislation [Tanford & Bocchino, *Rape Victim Shield Laws and The Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980)] this potential encroachment on the Right to Confrontation is an important question which should be decided by this Court.

Should not the petitioner have been allowed to explain his knowledge of Sue's past history of prostitution when he was charged with promoting her prostitution? Did the jury feel it likely that petitioner would participate in Sue's "rape" when the petitioner's statement showed he knew Sue to be a common prostitute? When petitioner's position at trial was that Sue willingly engaged in sex and brought these charges with the motive to harm petitioner, his wife

and Gary Blevins, would petitioner's version be more credible if the jury had known of Sue's past, destructive machinations? The answers to these inquiries are affirmative, and this is precisely why petitioner should have been allowed to confront his accusers.

The Court of Appeals of Kentucky suggested that even if there was error in excluding evidence under Ky. Rev. Stat. §510.145, it was harmless error because the evidence showed Sue to be a prostitute. *King* v. *Commonwealth* at 5. The appellate court missed the point because the evidence was not offered to prove Sue to be a prostitute.

Even so, denial of the effective right to cross-examine, "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 381 U.S. 1, 3 (1966), *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

III. THE FAILURE TO GIVE PETITIONER'S REQUESTED CORROBORATION INSTRUCTION PURSUANT TO RCr 9.62 VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I OF THE UNITED STATES CONSTITUTION WHICH RAISES AN IMPORTANT FEDERAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

The rules of criminal procedure in effect at the time of the alleged criminal act [Promoting Prostitution in the Second Degree, Ky. Rev. Stat. Ann. §529.040 (Bobbs-Merrill 1975), *See* Indictment, Appendix C at 1c] required that the testimony of an accomplice would not support a conviction unless corroborated. *See* Ky. Rev. Stat. Ann. RCr 9.62 (Bobbs-Merrill 1972) (Abolished Sept. 1,

1980). That rule of criminal procedure was abolished on September 1, 1980, approximately one month before petitioner's trial. Petitioner's requested corroboration instruction should have been given because to refuse the instruction is to give the repeal of the rule of criminal procedure a retroactive effect. That failure to give the requested corroboration instruction violates the *ex post facto* clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1.

Almost the precise question was dealt with in *Government of Virgin Islands* v. *Civil*, 591 F.2d 255 (3rd Cir. 1979) where it was held that a defendant was entitled to the benefit of the corroboration statute, even though repealed after the crime occurred, because to do otherwise would violate the *ex post facto* doctrine of the United States Constitution. Indeed, the Supreme Court of Kentucky's decision in *Commonwealth* v. *Brown*, 619 S.W.2d 699, 703 (Ky. 1981), which was rendered after the petitioner's conviction in the trial court but before the appeal was decided is *exactly* on point and would require the requested instruction be given.

The Commonwealth argued there was no *ex post facto* violation, citing this court's opinion in *Dobbert* v. *Florida*, 432 U.S. 282 (1977), because the change was one of procedure rather than of substance. Brief for Appellee at 17.

The Court of Appeals of Kentucky avoids the issue by stating the testimony of the accomplice, Kim, was corroborated by Sue, and, hence, no error. *King* v. *Commonwealth* at 6. This is incorrect because Ky. Rev. Stat. §529.060 required Sue's testimony to be corroborated, and RCr 9.62 required Kim's testimony to be corroborated further. In other words, double corroboration was required,

and it was not present. Please note that Gene Ross, the other person present, said petitioner was not involved.

The failure of the Kentucky appellate court to consider an important question of federal constitutional law emphasizes the need of the United States Supreme Court to put this question to rest and prevent any further violations of the prohibition against *ex post facto* laws in U.S. Const. art. I, § 10, cl. 1.

IV. THE TRIAL AND APPELLATE PROCEEDINGS WERE TAINTED BY A SERIES OF PREJUDICIAL ERRORS THAT WHEN TAKEN INDIVIDUALLY OR AS A WHOLE, RENDERED THE CONVICTION SO FUNDAMENTALLY UNFAIR AND IN DIRECT CONFLICT WITH A DECISION OF THIS COURT THAT IT DENIED THE PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Not only did the trial and appellate courts ignore the United States Constitution and the decisions of this Court, they even ignored their own decisions, the most flagrant example of this being the refusal to acknowledge *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) as being dispositive of the argument that the refusal to give the accomplice instruction was an *ex post facto* violation. It is elementary that a citizen may rely upon the courts to follow their own decisions.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). The actions of the trial and appellate courts of Kentucky denied petitioner the fair opportunity mentioned.

Although the admission of the tape of the events prior to the alleged rape was erroneous, the use of the tape was unjust and unfair and constituted a denial of due process of law. Not only was the tape played before the jury four times, but the tape was taken to the jury room, over petitioner's objection, and played for hours by the jury. This is violative of the common law of the Commonwealth of Kentucky. *See Williams* v. *Watson*, 268 S.W. 1067, 1069 (Ky. 1925). The tape was highly inflammatory due to the language used on the tape and the subject matter of the tape. The use of the tape was and is offensive to traditional notions of justice and fair play during the conduct of a criminal trial.

Petitioner has made clear his constitutional objections to the court's prohibition of cross-examination concerning Sue's past conduct but in addition to those constitutional objections is the assertion that it is unjust and a denial of due process to allow the Commonwealth to introduce evidence concerning Sue's past conduct via the petitioner's statement given to the police and then refusing the petitioner the right to cross-examine and introduce evidence concerning matters placed before the jury by the adversary party, Commonwealth of Kentucky.

In the same regard, it is unfair for the courts and the prosecution to keep from the jury the true facts concerning Sue's history and probable motivation concerning the events in question and at the same time state to the jury as a fact that Sue was mentally retarded. The only purpose in doing so was the Commonwealth's object of inflaming the jury by implying that Sue was retarded. There was no legitimate purpose in doing so because there was no evidence of retardation and no claim of a lack of consent based on retardation.

Perhaps most important in the denial of justice was the fact that the trial court changed the rules of the game after the game had been played. The agreed order stated that petitioner's guilt could only be had on a showing of aiding and assisting the persons who had sex. It was expressly represented before trial that criminal liability would not attach because of a conspiracy between those present to force Sue to have sex against her will. However, after all of the evidence was taken and after the petitioner testified, the trial court in its instructions changed the rules and stated that petitioner would be guilty if Gary Blevins forced Sue to have intercourse with Buck Johnson and if petitioner assisted Gary Blevins. It is a denial of fundamental fairness for a trial court to refuse to uphold its own orders. It is a denial of fundamental fairness to promise the petitioner that he is not guilty because of a conspiracy and then to convict him because he conspired with Gary Blevins to force Sue to have sex with Buck Johnson.

In the same vein it denies due process for the appellate court to refuse to consider errors denounced by its common law and denounced by the United States Constitution and the decisions of this Court.

The facts of this case reveal that petitioner was denied a trial and an appeal in accord with traditional and fundamental standards of due process and of fair play. This is a serious miscarriage of justice encroaching upon a citizen's federal rights under the United States Constitution that this Court should address.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky in *King* v. *Commonwealth*, No. 81-CA-742-MR (Ky. Ct. App. Dec. 23, 1981).

Respectfully submitted,

ROBERT LESLIE ROSENBAUM, ESQ.
ROSENBAUM & ROSENBAUM
Suite 300, The Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(606) 259-1321